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March 15, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Salas
Secretary
Federal Communications Commission
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445 - 12th Street, S.W.
Washington, DC 20554

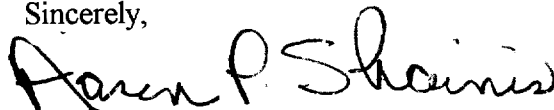
Re: MM Docket 95-31

Dear Ms. Salas:

Transmitted herewith, on behalf of Jack I. Gartner, is an original and four (4) copies of his Reply Comments in the above-referenced rulemaking proceeding.

Please contact the undersigned in the event the Commission has any questions with respect to these Reply Comments.

Sincerely,



Aaron P. Shainis
Counsel for
JACK I. GARTNER

Enclosure

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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of:

Reexamination of the Comparative
Standards for Noncommercial
Educational Applicants

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MM Docket No. 95-31

To: The Commission

REPLY COMMENTS OF JACK I. GARTNER

Jack I. Gartner ("Gartner"), by his undersigned counsel and pursuant to the Commission's Further Notice of Proposed Rule Making in MM Docket No. 95-31,¹ hereby respectfully submits his Reply Comments in the above-captioned proceeding.

As Gartner noted in his earlier-filed Comments, he is an applicant for construction permit for a new commercial television station to operate at Davenport, Iowa. Gartner is the only commercial applicant which has applied for the Davenport channel. Yet, because two other noncommercial educational entities have filed applications for the Davenport channel, Gartner is prohibited from providing service to the Davenport market.

Gartner demonstrated in his Comments that the Balanced Budget Act of 1997 (the "Act"),² by its own language, does not intend for non-reserved channels to be awarded by any means other than by auctions. Not surprisingly, groups such as National Public Radio, the Association of America's Public Television Stations and the Corporation for Public Broadcasting ("Joint Commenters"), and a host of other noncommercial broadcast licensees have argued to the contrary -- that subjecting noncommercial educational applicants to auctions would violate the

¹ Reexamination of the Comparative Standards for Noncommercial Educational Applicants, 13 FCC Rcd 21167 (1998).

Act.³ These noncommercial educational broadcasters argue that if Congress had sought to limit the statutory prohibition against auctions to applications for channels reserved for noncommercial educational use, it would have specifically stated so in the Act. Since the statutory language does not expressly contain such a limited exemption, these parties reason that Congress must have intended that the restriction on competitive bidding involve any situation, including applications for reserved and non-reserved channels, in which a noncommercial educational applicant is present.

These parties go too far in their assumption, however. As pointed out by De La Hunt Broadcasting,⁴ one could read the language of the Act to mean that it is the nature of the allotment which should control, not the nature of the particular applicant, since any applicant is only proposing a commercial or noncommercial format on a commercial allotment. Such a reading would be consistent with the Commission's historical treatment of noncommercial and commercial applicants applying for commercial spectrum. Moreover, importantly, as pointed out by Big Sky Broadcasting Company⁵, Congress, when enacting Section 309(i)(5)(B) of the Act, terminating the Commission's lottery authority for all applications other than those for noncommercial educational broadcast station licenses, specifically stated that Section 309(i)(5)(B)

² Balance Budget Act of 1997, Pub. L. No. 105-33, 11 Stat. 251 (1997).

³ Joint Comments of National Public Radio, Inc., the Association of America's Public Television Stations and the Corporation for Public Broadcasting Joint Comments, filed January 28, 1999 at 31-33; Comments of Noncommercial Educational Broadcast Licensees On Use of Spectrum Not Reserved for Commercial Use ("Noncommercial Licensees"), filed January 28, 1999 at 3-4 ("the statutory prohibition against competitive bidding for noncommercial educational or public broadcasters is defined not by the frequencies or channels proposed to be used by those broadcasters, but by the eligibility of the applicant and its proposed use of the frequencies or channels." (emphasis in original); Comments of the Sister Sherry Lynn Foundation, Inc., filed January 28, 1999 at 5-6; Comments of Augusta Radio Fellowship Institute, Inc., filed January 28, 1999 at 8-9; Comments of the Moody Bible Institute of Chicago, filed January 28, 1999 at 16-17; Comments of Houston Christian Broadcasters, Inc., filed January 28, 1999, at 16-17; Comments of Faith Broadcasting, Inc., filed January 28, 1999, at 10-11.

⁴ Comments of De La Hunt Broadcasting, filed January 28, 1999, at 3-4.

⁵ Comments of Big Sky Broadcasting Company, filed January 28, 1999, at 2-3.

did “not prevent the Commission from awarding licenses for [NCE] stations through the competitive bidding process.”⁶ The Commission is bound by Congress’ intent as expressed in the legislative history to the Act. It must retain its current policy of handling noncommercial educational applications for non-reserved broadcast frequencies in the same manner as mutually exclusive commercial applications.

Nor does the Commission have the ability to ignore Congressional intent as requested by the Joint Commenters.⁷ Gartner has no objection to noncommercial educational entities participating in auctions as envisioned by one noncommercial educational licensee.⁸ The Commission must treat all similarly situated applicants the same by requiring them to proceed through the same auction process. See Melody Music, Inc. v. FCC, 345 F.2d 730 (1965).

In the event the Commission succumbs to the obviously biased arguments of the many noncommercial educational parties in this proceeding and finds that the Act precludes the participation of noncommercial educational applicants in auctions, then the Commission has a couple of different options. Gartner restates his position made in his Comments that the Commission may hold noncommercial educational entities ineligible for non-reserved channels completely as one way to resolve the problem. This position is supported by Elgin FM Limited Partnership, which also takes the position that all noncommercial educational entities should be restricted to filing applications on reserved frequencies. Such a restriction would eliminate the need to resolve the ability of such entities to participate in the competitive auction process.⁹ Another option would be to accept the suggestion of De La Hunt Broadcasting, that the

⁶ Conference Report on H.R. 2015, Balanced Budget Act of 1997.

⁷ Joint Comments at 33.

⁸ Comments of Educational Media Foundation, filed January 28, 1999, at 12.

⁹ Comments of Elgin FM Limited Partnership, filed January 28, 1999, at p. 2.

Commission require all applicants to file as commercial applicants, but allow each applicant to choose whatever format (noncommercial or commercial) it wished to adopt after it obtained the channel in question.¹⁰

A number of Commenters support Gartner's position that existing noncommercial applicants for non-reserved allotments should be accommodated by assigning each of them to a vacant channel in the reserved FM band where they may operate and provide service to their preferred communities of license.¹¹ No applicant is automatically entitled to the channel specified in its application.

Gartner continues to oppose the position of Joint Commenters that the Commission establish a separate processing track for noncommercial educational applications for commercial spectrum.¹² The plan is so decidedly unfair and one-sided as to be unworthy of in-depth discussion. Noncommercial educational applicants, who already have been given an entire set of channels which only they may file applications, request the ability to render reserve channels noncommercial in nature by their mere filing. While noncommercial broadcasting is a valuable resource, no showing has been made that it is always superior to commercial broadcasting.

Similarly, the hybrid point system approach offered by Joint Commenters is unworkable since it attempts to compare commercial and noncommercial educational applicants when this simply cannot be done. As pointed out by the Noncommercial Licensees,¹³ noncommercial

¹⁰ De La Hunt Broadcasting at 5.

¹¹ See e.g. Comments of CSN International, filed January 28, 1999, at 7.

¹² Joint Comments at 38-39. Other Commenters also support the approach that whenever commercial and noncommercial educational applicants apply for the same channel, the Commission should dismiss the commercial application. University of California Comments, filed January 27, 1999, at 7.

¹³ Noncommercial Licensees at 5.

educational applicants are structured so differently from commercial applicants that it is not possible to compare them.

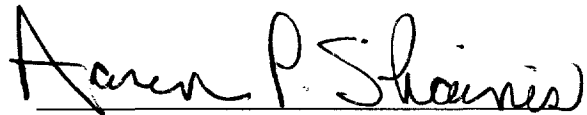
Similarly, the approach submitted by Noncommercial Licensees that noncommercial educational and commercial applicants be compared on the basis of "need" misses the mark. First, its approach is biased in favor of noncommercial educational applicants. Second, its proposal is unworkable since it assumes that there must exist a ratio of noncommercial educational radio service to commercial radio service of at least 20%, based on its current view of the broadcast spectrum. Not only is this conclusion unsupported by any finding, but it ignores the number of noncommercial educational broadcasters who are already broadcasting on non-reserved channels. Thus, any ratio would have to exceed 20% even if one accepted the premise of Noncommercial Licensees' argument.

For the reasons set forth above and in Gartner's Comments, the Commission should maintain its current policy and treat noncommercial educational applicants seeking non-reserved broadcast channels in the same manner as it does mutually exclusive commercial applicants by holding auctions for those non-reserved channels.

Respectfully submitted,

JACK I. GARTNER

By:



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